No. 700

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

CITY OF WENDELL, IDAHO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

and

SUPPORTING BRIEF

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Filed January....., 1957

SUBJECT INDEX

Page

Reference to opinions 1

Jurisdiction of Supreme Court 2

Questions presented 3

Statutes involved 5

Statement of the case 7

Basis of initial federal jurisdiction 11

Argument 11

City of Wendell has not undertaken construction 12

Any remedy or defense available in federal court is available in state court 21

Gen. obligation bonds of Idaho city in excess of statutory and constitutional maximum void 23

Those dealing with municipality must at their peril inquire into power of corporation 24

Basic authority of municipal officers 25

Cases cited by Court of Appeals do not reasonably support that court's decision 26

Conclusion 31

Appendix 34

Opinion Court of Appeals 34

Order District Judge (12/21/56) 39

Sec. 50-2935, Idaho Code 43

Sec. 50-3128, Idaho Code 43

Art. 8, Sec. 3, Idaho Constitution 43

TABLE OF CASES, STATUTES and TEXTS

Page

Broad v. City of Moscow 15
City of Oakland v. Key System 24
Davis v. Gray 22
Gamewell Co. v. City of Phoenix 28
General Hospital v. City of Grangeville 23
Hoyt v. Russell 20
H. J. McNell, Inc. v. Canyon County 26
Moore v. City of Nampa (Sup. Ct.) 16, 18, 24, 26
Moore v. City of Nampa (Ct. Appeals) 18, 32
North Side Canal Co. v. State Board of Equalization 21
O.S.L.R. Co. v. Berg 18
Rich v. McClure 20
Smith v. Boise City 16, 18
U. S. v. Board of Education, City of Bismarck 29
Village of Heyburn v. Sec. S. & T. Co. 23, 28

War Mobilization and Reconversion Act, Sec. V .. 5
Act June 25, 1948, C. 646, 62 Stat. 928, 28 U.S.C.A. 1254 3
Act. June 25, 1948, C. 646, 62 Stat. 933, 28 U.S.C.A. 1345 11
52 (a), Fed. Rules Civil Procedure 19
Art. 8, Sec. 3, Idaho Constitution 23, 44
Sec. 50-1104 Idaho Code 25
Sec. 50-2801 Idaho Code 22
Sec. 50-2913 Idaho Code 9
Sec. 50-2935 Idaho Code 13
Sec. 50-2936 Idaho Code 15
Sec. 50-3231 Idaho Code 13

38 Am. Jur. 182 23
18 Cal. Jur. 2d 452-3 20
16 C. J. S. 25 21
35 C. J. S. 1247 22

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TO THE HON. EARL WARREN,
CHIEF JUSTICE, AND TO THE ASSOCIATE
JUSTICES OF THE UNITED STATES
SUPREME COURT.

This petition respectfully shows:

1 (a). The opinion of the District Court for the District of Idaho, Southern Division appears on pages 25 and 26 of the transcript of the record in the Court of Appeals.

The opinion of the Court of Appeals for the 9th Circuit is reported—United States v. City of Wendell, 237 F. 2d 51, and also appears beginning on page 34 of the appendix hereto.

The only other opinion delivered upon the rendering of the judgment or decree is that of the Hon. Fred M. Taylor, being an order dated December 21, 1956, which appears beginning on page 39 of the appendix hereto.

JURISDICTION OF THE SUPREME COURT

1 (b). The grounds on which the jurisdiction of this court is invoked are:

(1) The Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court;

(2) The United States Court of Appeals for the Ninth Circuit has decided a federal question in a way in conflict with the applicable decisions of the Supreme Court of the United States;

(3) The Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(i) The date of the judgment or decree sought to be reviewed and the time of its entry is September 21, 1956.

(ii) The date of the denial of the petition for rehearing submitted by the City of Wendell was November 12, 1956.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree by writ of certiorari is: Act of June

25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. 1254, which provides that cases in the Court of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

QUESTIONS PRESENTED

1 (c). The questions presented for review are the following:

(1) The United States is not entitled to be repaid the advance made to petitioner under authority of Section V of War Mobilization and Reconversion Act of 1944, 58 Stat. 791, 50 U.S.C.A. 1671 (1944), which was enacted "In order to encourage States and other non-Federal public agencies to make advance provision for the construction of public works . . . .", when, as found by the United States District Court the "construction of the improvement work contemplated by the plans, specifications and blueprints, for which such advancements totaling 1700.00 were so made, was not undertaken or started by the defendant (City of Wendell) or any one on its behalf, and no contract has been awarded for the doing of such construction work." (trans 31), and such plans, specifications and blueprints paid for with the funds so advanced were not utilized or put to any beneficial use whatsoever. In fact it was found to be necessary to abandon the project entirely because it

ran counter to the positive constitution, laws and decisions of the State of Idaho.

(2) The fact that at a later date a local street improvement district was created under the local improvement district code of the State of Idaho, embracing about 15 per cent of the territory within the corporate limits of the City of Wendell, which improvement district improved the streets within its boundaries does not constitute such an undertaking or starting of construction within the meaning of the War Mobilization Act under consideration as to entitle the United States to be repaid said advance, the two projects being entirely separate and distinct. The War Mobilization Act provides that advances made under such act shall be repaid if and when the construction of the public works so planned is undertaken, and this has not yet come about.

(3) The Court of Appeals erred in concluding that "As to the special defenses which Wendell says were in Idaho Municipal law, this court is not disposed to explore them." Rights created and remedies provided by the statutes of the state, to be pursued in the state courts of general jurisdiction, may be enforced and administered in the federal courts, since one going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality.

(4) The Court of Appeals erred in not "plumbing" the government's contention of mistake by the city in making written representation.

(5) The authorities cited in the opinion of the Court of Appeals do not sustain that court's position.

STATUTES INVOLVED

1 (d). This case involves an interpretation of Section 501 of Title V of the War Mobilization and Reconversion Act of 1944, Public Law 458, 78th Congress, approved October 3, 1944, 58 Stat. 791, 50 U.S.C.A. 1671 (1944), and a portion of the regulations promulgated under authority of said act. Verbatim copies of said Sec. 501 and the pertinent portions of the regulations are as follows:

"Sec. 501. (a)

> In order to encourage States and other non-Federal public agencies to make advance provision for the construction of public works (not including housing) the Federal Works Administrator is hereby authorized to make, from funds appropriated for that purpose, loans or advances to the States and their agencies and political sub-divisions (hereinafter referred to as "public agencies") to aid in financing the cost of architectural, engineering, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the construction of such public works: PROVIDED, That the making of loans or advances hereunder shall not in any way

commit the Congress to appropriate funds to undertake any projects so planned.

"(b)" Funds appropriated for the making of loans or advances hereunder shall be allotted by the Federal Works Administrator among the several States in the following proportion: 90 per centum in the proportion which the population of each State bears to the total population of all the states, as shown by the latest available Federal census, and 10 per centum according to his discretion: PROVIDED. That the allotments to any State shall aggregate not less than one-half of 1 per centum of the total funds available for allotment hereunder: PROVIDED FURTHER, That no loans or advances shall be made with respect to any individual project unless it conforms to an over-all State, local, or regional plan approved by competent State, local or regional authority.

"(c)" Advances under this section to any public agency shall be repaid by such agency if and when the construction of the public works so planned is undertaken. Any sums so repaid shall be covered into the Treasury as miscellaneous receipts.

"(d)" The Federal Works Administrator is authorized to prescribe rules and regulations to carry out the purposes of this section.

"(e)" As used in this section, the term "State" shall include the District of Columbia, Alaska, Hawaii, and Puerto Rico."

Regulations.

Section 3. Advances,—

"(d)" An advance shall not be required to be repaid until the construction of the pub-

lic work for which the advance is made is undertaken or started as provided by section 12 hereof. Until such construction is undertaken or started the advance shall not be deemed by the United States to be a debt or obligation within the meaning of any constitutional or statutory limitation.

"(e)" No interest charge shall be made for any advance . . .

"Section 12. REPAYMENT OF ADvance shall be repaid in full without interest by the applicant when the construction of the public work for which the advance is made is undertaken or started. The construction shall be considered as undertaken or started when the first construction contract is awarded or the applicant begins construction with its own forces."

STATEMENT OF THE CASE

1 (e) Statement of the case and facts material to the consideration of the questions presented:

In 1946 the United States advanced $1700.00 petitioner under section 501 of the War Mobilization and Reconversion Act. The purpose of this advance, as expressed in the opening sentence of the Act, was "In order to encourage States and other non-Federal public agencies to make advance provision for the construction of public works . . .", This sum was immediately transmitted to an engineering firm of Boise, Idaho, in payment of its engineering services, including the preparation of

plans, specifications and blueprints pertinent to a proposed street improvement program comprising 71 blocks in the Village of Wendell. Had they been issued such bonds, under the plan, would have constituted a general obligation of the entire town, which had an area of one section of land or 640 acres. An estimate obtained from a construction company revealed that the project contemplated by the Government plan would cost something like $60,000.00 (trans 49). This sum being far in excess of the debt limitation fixed by the Constitution and Statutes of the State of Idaho, independent of the fact that there were already general obligation bonds of the Village outstanding in the sum of $20,000.00, this project was necessarily abandoned, and in the latter part of April, 1949, the plans and specifications so prepared by the funds advanced by the United States were returned to the Government's agency without having been utilized (trans. 30).

In 1948 a petition was filed for the creation of a local street improvement district (trans. 47) under Title 50, Chapter 29, Idaho Code. Under this program the cost and expenses of the improvement are "taxed and assessed upon all property in such local improvement district, which cost and expenses shall be assessed in proportion to the number of square feet of such lands and lots abutting, adjoining, contiguous and adjacent thereto

included in the improvement district formed." Sec. 50-2913, Idaho Code. This local street improvement district as so created comprised 41 city blocks (trans. 65), or approximately 15 per cent of the town. Included in the improvement district were 31 blocks of the lands which had been within the project contemplated under the Government plan (trans. 46). May 25, 1949, a contract was let with the Western Construction Co. for the improvement of the streets within this improvement district. The contract appears as plaintiff's ex. No. 10, brief excerpts from which appear in the transcript beginning at page 64. The cost of this project was $27,475.00. This job was not tied in in any respect or particular with the plans and specifications so made with the money advanced by the United States. This job done by the Improvement District was a "cheaper type of construction" (trans. 48). No plans or specifications were made for or used on this job. The contract called for the work to be done according to "Standard Specifications of the Idaho Bureau of Highways" (trans. 66). The contractor testified that the work was done according to such highway standard specifications, and that there were "no Government of private plans or blueprints connected with this project" (trans. 66-7). In fact the Government-sponsored plans had been returned to the government agency about thirty days before

the contract was let to the Western Construction Co. Under this improvement district program all costs and expenses of the improvement were taxed, assessed and paid by the property within the district, and no part thereof was paid as a general obligation of the Village (now City) of Wendell.

After this contract was let for the improvement of these streets within the local street improvement district the United States demanded that it be repaid said sum of $1700.00, claiming that the construction of the project for which it had advanced the funds for plans and specifications had in reality been "undertaken" within the meaning of the War Mobilization and Reconversion Act of 1944, and the regulations promulgated thereunder. See text of act and pertinent regulations page 5 hereof. The City of Wendell considering it was not obligated to repay this sum under the circumstances, did not do so, and this suit resulted.

The District Court determined and found that the two projects were separate and distinct, that the City had not undertaken or begun the construction of the Government-planned project and had not utilized the plans procured by the funds advanced by the government and entered judgment that the government take nothing against the City of Wendell. Upon appeal the Court of Appeals for the Ninth Circuit reversed the District Court.

1 (g) The basis for federal jurisdiction in the Court of first instance is the Act of Congress of June 25, 1948, C. 646, 62 Stat. 933, 28 U.S.C.A. 1345, which provides that the District Court has original jurisdiction over all actions commenced by the United States.

ARGUMENT

1 (h) The Court of Appeals, by its interpretation of Sec. 501 of the War Mobilization Act, has decided an important question of federal law which has not been settled by this Court. It is respectfully urged that this question should be settled by this Court because of the national scope and widespread utilization of this act, which undoubtedly means that there are numerous pending claims of a similar nature awaiting the outcome of this case before presentation, which could be more readily and satisfactorily adjusted if a precedent be established by this Court.

The purpose of the act under consideration is to encourage states, agencies and political subdivisions established by law and which have basic authority to construct public works (Regs Sec. 1) (e) to make advance provision for the construction of public works. Under the positive provision of the act and the authorized regulations any ad-

vance made to a public agency "shall be repaid by public works so planned is undertaken."

It is petitioner's very firm contention, not shaken by the opinion of the Court of Appeals, that the construction of the public works contemplated by the Government-sponsored plans has not been "undertaken or started" by the City of Wendell, within the letter or spirit of the act and attendant regulations, and therefore that the United States should not be repaid the advance in question. The reasons supporting this contention are:

Under the original or Government-sponsored project the plan was that the Village of Wendell should do the construction work or improvement of the village streets, obtaining the funds therefor by the issuance and sale of general obligation bonds of the village itself, as appears from the original application (tr. 23), and as found by the District Court (tr. 31). This plan had to be and was totally abandoned as soon as it was realized that it was forbidden by the constitution, laws and decisions of the State of Idaho. The only street improvement project, other than day to day upkeep, undertaken within said municipality since that time was planned, done and financed by an entirely separate and distinct entity, namely, "Local Street Improvement District No. 1, Wendell, Idaho." To support petitioner's argument that the Village-city of Wendell and this street im-

provement district are separate entities we refer to a former decision of none other than the Court of Appeals for the Ninth Circuit—the case of Moore v. City of Nampa, 18 F. 2d 860, affirmed by the Supreme Court, 276 U. S. 536, 48 S. Ct. 340. In the Nampa case the plaintiff, a bond holder in a sewerage improvement district, alleged that the City of Nampa had been negligent in handling the affairs of the improvement district, and among other things it was alleged that a false and misleading certificate had been issued by certain of the city officers. The sewerage improvement district under consideration in the Nampa case was formed and operated under the Idaho Local Sewerage Improvement District Code, which was not materially different from the Idaho Local Street Improvement District code in effect when the improvement district was formed in the City of Wendell. The particular statutes with which the courts are most concerned are Sections 50-2935 and 50-3231 of the Idaho Code. These two sections are copied in full and appear at page 43 of the appendix hereto. Because the statutes are so similar it would seem that the Court of Appeals for the Ninth Circuit should have been influenced by its rules relative to the sewer improvement district in the Nampa case, when considering the power, authority and functions of a similar improvement district in the immediate action. We

quote the following from the opinion of the Court of Appeals in the Nampa case:

> "It is to be borne in mind that the officers of the defendant, (City of Nampa) in making the improvement, were not performing corporate functions of the defendant. They were exercising a special power vested in them with reference to local improvement, in which the City as a whole was not concerned. In doing so they were successors to powers which prior to 1917 had been exercised through a "sewer construction committee," distinct from the city council, appointed for the purpose of authorizing and carrying out sewerage improvements. In all the transactions herein involved they were but instrumentalities for originating, carrying out, and paying for the expenses of local improvements, the cost of which was assessable against the property benefited thereby. In this fact is an insuparable obstacle to the right of the plaintiff to recover herein, for the officers of the city were not acting on its behalf, and they had no authority to bind it by any act or failure to act in the premises . . . And it is uniformly held that in collecting money to pay for special improvements, where there is no liability against the corporation, the corporation authorities do not act as its representatives, but as special agents or instrumentalities to accomplish a public end. (Citing cases)."

How very different is the holding of the Court of Appeals in the immediate action, upon the same issue. The Court of Appeals holds that the switch from general obligation bonds to improvement

district is only "a detail in the method of financing," because the improvement district is "entirely managed and directed" by the City, the district is not a separate arm of government, it is a part of the city, the city sets it up, lets its contracts and collects the assessments. The Court of Appelas further states that if the improvement district were a separate entity then the government would have no case because that would mean the city did not do a job, and the fact is that the advancement was made to the city for the city to do a job. The Court of Appeals of course concludes that the City did do a job, and hence must repay the advancement.

It is possible that the Court of Appeals was influenced by the fact that the contract for the improvement of the streets in the improvement district was let in the name of the city, which is true (tr. 64-5). However the statute requires all contracts for improvements authorized by the local improvement code to be "in the name of the municipality." 50-2936, Idaho Code. This feature is fully discussed by the Idaho court in the case of Broad v. City of Moscow, 15 Idaho 606, 99 Pac. 101, 106, wherein it is held that despite the fact that contract is in the name of the city, "It is not an obligation or contract of the city." This is one of the cases cited by the Court of Appeals

in support of its decision in the case of Moore v. City of Nampa, 18 F. 2d 860.

We can agree with the Court of Appeals in stating that this "advancement was made to the City of Wendell for the City to do a job." But we cannot agree that the City did a job, that is, a construction job. Remember that this same Court of Appeals held in the Nampa case (18 F. 2d 860) that the city officers were not acting as instrumentalities of the city in activating the improvement district and making the improvements," and they had no authority to bind it by any act or failure to act in the premises." The decision in the Nampa case was stressed in the petition for rehearing filed with the Court of Appeals on behalf of the City of Wendell. This Nampa case had been approved by the same Court of Appeals in the later case of Smith v. Boise City, 104 F. 2d 933, where it is pointed out that no Idaho case to the contrary has been called to the Court's attention. Then, of course, the Nampa case was affirmed by this Court. Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340.

How can it be fairly said that the "City did do a job", when the City had no funds at work, it was not obligated for any part of the contract price, its officers were not performing a corporate function or acting on behalf of the City, or as representatives of the City, "but as special agents or

instrumentalities to accomplish a public end." Such being the limit of the City's participation in the activities of the improvement district, how can it be properly held that the City of Wendell has "undertaken" the construction of the works contemplated by the Government-sponsored plans, which certainly must be held before the City of Wendell can be justly required to repay the sum so advanced to it by the United States. Work undertaken by some other person or entity than the City of Wendell cannot operate to fix the liability on the City of Wendell to repay the advancement.

The situation can well be illustrated by comparing it to the rather common practice of business corporations having overlapping directors. If two or three men happen to be directors both on the board of General Motors Co. and the board General Electric Co., their official actions as directors of the former would not bind the latter corporation, and vice versa. So in the immediate action, the action that certain individuals did and authorized "as special agents or instrumentalities to accomplish a public end" on behalf of Local Street Improvement District No. 1, Wendell, Idaho, would not and could not bind the City of Wendell as a municipality. Therefore, when the improvement district undertook to do some improvement work on the streets of Wendell that did not mean the City of Wendell was "undertaking or starting"

a construction job on its streets so as to obligate the City to repay the United States the sum in question.

The net result of the opinion of the Court of Appeals is to hold the municipality of Wendell liable for the obligations of the local Street improvement district because it is the only entity or person which did any undertaking or starting of street improvement work or contracting that has been undertaken or started. The improvement district should be liable for the cost of planning, not the municipality or the citizens of Wendell as a whole. In other words, this undertaking or starting of work by the local street improvement district is, according to the Court of Appeals, the action which has fastened liability on the City. Thus the City proper and all of its citizens have been held liable for the actions of the local street improvement district, and this is something this Court (Moore v. Nampa, supra), the Court of Appeals for the Ninth Circuit (Moore v. Nampa, supra and Smith v. Boise City, supra), and the Supreme Court of Idaho (O. S. L. R. R. Co. v. Berg, 52 Idaho 499, 16 P. 2d 373) each and all held cannot properly be done. In the latter Idaho case, referring to similar local improvement district bonds, the Idaho court states:

> "The bonds contained herein were not general obligations of the City, only of the

> District, *in rem* . . . and had for security only the property within the district . . . . the City being obligated only to make the necessary collections and payment, and if any piece of property defaulted, the bondholders had the right to foreclose on the same. (Citing cases)".

Since the decision of the Court of Appeals in the case at bar is in serious conflict with its previous decision in the case of Moore v. City of Nampa, supra, and the latter decision has been affirmed by this Court, it necessarily follows that the decision of the Court of Appeals in the immediate action is in conflict with an applicable decision of this Court and should be reversed.

Supporting petitioner's contention that it did not start or undertake the work outlined in the plans are the opinion (tr. 26), finding (tr. 30) and conclusion (tr. 33) of the District Court, which are based on confliction and substantial evidence and should not be disturbed unless clearly erroneous· 52 (a), Fed. Rules of Civil Procedure, 28 U.S.C.A.

Another reason supporting petitioner's contention that the job contemplated by the government plan has not been undertaken by the City of Wendell, or anyone else, is the fact that the area included in the improvement district only comprises about 15 per cent of the city. As shown, only the land itself in the improvement district is

liable for the improvement district bonds, while if the government plan had been carried out and general obligation bonds of the city issued the entire city would be responsible for the obligation. It does not appear of record what the area of Wendell is. However this court held, in the case of Hoyt v. Russell, 117 U. S. 401, 29 Law Ed. 914, that " . . . . a court will take judicial notice of the boundaries of the State or Territory where it holds its sessions and of judicial districts and municipal subdivisions withi nit." See also 18 Cal. Jr. 2d 452-3, and Rich v. McClure, 248 Pac. 275. Therefore, it can properly be pointed out that the City of Wendell comprises 640 acres, and the street improvement district comprises only 41 blocks (tr. 65), or in other words, that the improvement district included only about 15 per cent of the area of the city. This seems too wide a difference and too material a variation in the area involved to conclude, as the Court of Appeals did, that these two were in effect the same project. The Court of Appeals states, in effect, that this was a mere "de minimis overlapping of area," which evidently means the Court concluded the two areas are so similar as to be in effect the same. The conclusion does not seem supported in fact or law, and thereby the Court of Appeals has so far departed from the accepted and usual course of judicial pro-

ceedings as to call for an exercise of this Court's power of supervision.

Coming now to the *third question,* which is that the Court of Appeals erred in refusing to explore the special defenses of the City of Wendell. One of the important defenses relied upon by the City of Wendell was that the City was prohibited from proceeding with the program planned by the government by the fact that the general obligation bonds necessary to be issued for carrying out the project were in excess of the maximum allowed by the constitution, laws and decisions of Idaho, and had such bonds been issued they would have been void and unenforceable. It is recognized that the constitution of the State of Idaho is the supreme law of the State of Idaho, subject only to such restraint as may be imposed by the Federal constitution, 16 CJS 25.

A party going into a Federal court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of Idaho, and any remedy or defense available in the Idaho courts to the City of Wendell should have been available to it in the Federal court. North Side Canal Co. v. State Board of Equalization, 17 F. 2d 55, (petition for writ of certiorari denied, 274 U. S. 740, 47 S. Ct. 586). This opinion relies on the Supreme Court's decision in the case of Davis v. Gray, 16 Wall. 203, 21 Law Ed. 447, and

other authorities. In other words, the constitution and laws of Idaho are just as effective in the federal courts as in the state courts, and should be given full consideration and recognition by the federal courts in all cases where not superseded by the constitution of the United States. In fact it is generally recognized that decisions of the highest State court as to the construction and application of its constitution or statutes are binding upon the federal courts, unless in conflict with the United States constitution. 35 C.J.S. 1247.

With this rule in mind what is the situation with respect to the proposed $50,000.00 general obligation bonds of Wendell, a component part of the program outlined by the Government plans? It is the City's position that these general obligation bonds amounting to $50,000.00 could not have lawfully been issued as planned, and had they been issued they would have been of no value, in fact void.

As found by the District Court, under Section 50-2801, Idaho Code the maximum tax levy a municipality can make is 15 per cent of the assessed valuation of the real and personal property in the municipality for the preceding year (tr. 31). The assessed valuation for Wendell for the year in question was $208,140.00 (tr. 32), and the court found further that at that time there were already outstanding general obligation bonds of the City

in the amount of $20,000.00. This made it absolutely impossible for Wendell to issue general obligation bonds in the amount of $50,000.00, or any sum approximating that amount.

Also the District Court found (tr. 32) that the City could not issue these bonds without an election for that purpose under Section 3, Article 8 of the Idaho Constitution, a copy of which appears on page 43 of the appendix hereto. This section of the constitution was fully considered in the case of Village of Heyburn v. Sec. S & T. Co., 55 Idaho 732, 49 P. 2d 258. This case clearly reveals the dangers of issuing bonds in excess of the constitutional and statutory limitation. In the Heyburn case the bonds that were issued represented an indebtedness exceeding the statutory and constitutional maximum, and the question was whether or not the bonds were valid and enforceable against the Village. In part the court said:

> "The bonds having been issued in violation of constitutional prohibitions are *void* and never created any municipal indebtedness. Being void they could never become valid or collectible in the hands of a purchaser." (Pg. 265 Pac. Rep.)

See also, General Hospital v. City of Grangeville, 69 Idaho 6, 201 P. 2d 750, and 38 Am. Jur. 182.

The United States and its agents must have known the constitution, laws and decisions of Idaho. The government agents were in the business

of making advancement under the War Mobilization Act, and certainly must have known that every municipality is limited as to the amounts of funds which it may expend or the bonds it may issue. In the case of Moore v. City of Nampa, supra, the Supreme Court in speaking of the purchaser of bonds, stated:

> "He is charged, as of the time he bought the bonds, with notice of the invalidating facts, and is held to have known the law." (276 U. S. 541).

It is generally recognized that all persons contracting with a municipal corporation must at their peril inquire into the statutory power of the corporation or of its officers to make the contract, and a contract beyond the scope of the corporate power granted or conferred by the legislature expressly or by fair implication is void. City of Oakland v. Key System, 149 P. 2d 195, 203.

The *fourth question* raised has to do with observation of the Court of Appeals in the latter part of its opinion to the effect that the Court of Appeals will not explore the government contentions of mistake based on the city's written representations that it could enter into the basic contract. Judging by several comments and inquiries made by the members of the Court of Appeals during oral argument this has reference to paragraph 15 in the application for advance. This paragraph

appears on page 22 of the transcript, and is as follows:

> "15. Does the applicant have the basic legal authority to plan, construct, finance, maintain, and operate this public work? Yes. Give citations of basic legal authority."

The basic authority is to be found in Section 50-1104, Idaho Code, which gives municipal corporations authority to "establish, lay out, alter, open any streets or alleys, and improve, repair, light, grade, sprinkle, gravel, oil or drain the same and remove any and all obstructions therefrom, establish grades and construct bridges, crosswalks, culverts and sewers thereon and repair and maintain the same; . . ."

In the second place, if the city officials made a representation ill-advisedly, was it not their duty and privilege as city officials, as soon as they learned that they had made an error, to revise their statement and program, and discard any plans or programs which were beyond the scope of their authority and beyond the power of the municipality? Certainly they could not have and should not have gone ahead after they realized that the contemplated program was positively inhibited by constitution, statute and decision, and therefore not merely voidable but absolutely void.

Furthermore it has not been made to appear that the officials of the City of Wendell had any particular authority to guarantee or represent the

extent of the jurisdiction or authority of the municipality. At best the statements so made by the city officials merely expressed their opinion, and the situation comes within the following quotation from the supreme Court's opinion in the case of Moore v. City of Nampa, supra:

> "His (the bondholder's) position is not strengthened by the fact that respondent's officers, as well as the examining attorneys, were mistaken as to the validity of the additional assessments and subsequent proceedings. Recitals that merely reflect opinion as to the legal effect of the bonds or of the statements therein are not actionable and furnish no support for petitioner's claim.'

The *fifth question* raised is that the authorities cited in the opinion of the Court of Appeals in support of its position do not reasonably support that courts position and conclusions. Near the conclusion of its opinion the Court of Appeals states that after studying the case of H. J. McNell, Inc. v. Canyon County, 76 Idaho 74, 277 P. 2d 554, the Court of Appeals is convinced that the Idaho courts would let a private party recover from Wendell under circumstances like those involved in the present case. This might be true under facts and circumstances analogous to those involved in the Canyon County case, but we are equally sure the Idaho Court would not permit recovery under facts and issues like these now before the court. First, in the Canyon County case "the Board did not dis-

pute the justice of plaintiff's claim." The "Board" referred to was the Board of County Commissioners, which managed the affairs of Canyon County, and which was charged with allowing or disallowing the claim involved. The "Board" in the present case most violently disputes the justice of plaintiff's claim. That makes a big difference in the two cases. Second, it was clearly established and not disputed that Canyon County had been materially benefited by the work and materials furnished, and; third there was no constitutional or statutory inhibition involved. We quote from Section 7 of the opinion in the Canyon County case:

> "The Board having the power to make an express contract, the county can be held liable on the theory of an implied contract, where justice and equity so require . . . The county has accepted and received the benefits of the extra costs incurred by plaintiff. No constitutional or statutory inhibition is violated by the contract sued upon . . ."

As pointed out no benefit whatever has been derived by the City of Wendell from the plans and specifications so made by the engineers; and it has also been pointed out that there are constitutional and statutory inhibitions which would have been violated by the government-sponsored contract had it been consummated. Examining this Canyon County case we take the opposite view as taken by the court of appeals. We do not believe

the Idaho court would approve the claim of the United States because it was a part of a project and undertaking absolutely forbidden by constitution, statute and decision, and accordingly void and unenforceable. See the case of Village of Heyburn v. Security S. & T. Co. supra, page 23.

The case of Gamewell Co. v. City of Phoenix, 9th Cir., 216 F. 2d 928, 219 F. 2d 180, is cited also in the opinion of the court of appeals. In that case the court of appeals very definitely held, first, that the city had the power to contract for the services and materials involved. (Sec. 16 of opinion), and the court of appeals further held that the contract had been entered in good faith, that the City had been benefited thereby, and should not be allowed to retain the benefits without paying the reasonable value of what it received (Section 15 of the opinion). There again are two major differences between the reported case and the case at bar. There was power to contract and benefits were received. In the case at bar there was no power to contract and had the first project been carried out it would have been absolutely void because in excess of the debt limitation, and again the City of Wendell received no benefit of any kind from the plans and specifications for which recovery is sought.

In fact the Arizona case just referred to seems to definitely and positively support the position of

the City of Wendell that it did not benefit by the government plans and should not have to pay therefor. In the Arizona case recovery is limited to and measured by the "benefits received" by the City of Phoenix. On rehearing (219 F.2d 180) the Court of Appeals (9th Cir.) concludes with these words:

> " . . . . the cause is remanded for a new trial upon the question whether Gamewell has received sums in excess of such benefits, and for which excess the city should recover, or whether, on the other hand, the city has received benefits in excess of the amounts paid, for which Gamewell should recover."

The City of Wendell did not utilize these government plans and of course did not benefit from the plans directly or indirectly, and applying the formula of the Gamewell case the United States should not recover from the City of Wendell.

A North Dakota case is cited by the Court of Appeals. U. S. v. Board of Education, City of Bismarck, 126 F. Supp. 338. In that case when the bids were received on the building as first proposed in March 1949 it was found that the amount was too large and "immediately after the rejection of the bids covering the construction proposed by the first set of plans", steps were taken by the same school board to revise the program and proceed.

The major differences in the two cases are:

(1) In the North Dakota case there was continuity of action, that is the interested parties proceeded immediately with the second project when it was learned the first could not be carried out. By contrast, in the immediate action the first set of plans was made in 1946, and the project was abandoned soon after that, while the second project carried out by the improvement district was not undertaken until the signing of the contract with the contractor May 25, 1949. (tr 65).

(2) It is conceded in the North Dakota case that the first set of plans were referred to by the architect in preparing the second plans. In other words, some benefit was had. In the immediate action the plans prepared under the sponsorship of the government were not utilized in any manner, as found by the District Court (tr. 30). The evidence of the street superintendent is that these plans were not used on the construction job (tr. 49), and the contractor himself states that he did not even know of the existence of the plans (tr 67). So it can be definitely stated that the City of Wendell received no benefit whatever from the plans for which the government made advancement.

(3) The street improvement work that was done in the City of Wendell was done by an entirely different and separate agency from the agency

which proposed to do the construction work and improvements when the government plans were prepared, as has already been discussed in detail.

The situation in the North Dakota case is thus described in the brief filed on behalf of the United States in that case:

> "They used the same economic studies, the same contract with the architect, the same geographical surveys, the same bond issue, the same architect, the same location."

In the North Dakota situation there is a "sameness" in all aspects of the two projects. This obviously is not true in the present situation. The North Dakota case is too different to be controlling or authoritative, and petitioner urges that the Court of Appeals should not have adopted the North Dakota case as aprecedent.

IN CONCLUSION, and without reviewing the entire argument, it is respectfully urged that the city has not undertaken or done an improvement job on its streets, within the meaning of the War Mobilization and Reconversion Act, and therefore it should not be called upon to repay the government the sum advanced in 1946 under this act, which provides that advances made under the act shall be "repaid by such agency if and when the construction of the public works so planned is undertaken." Such improvement work as was done on the streets of the City of Wendell was done by

a local improvement district, and it was an entirely different project. The fact that the city officials acted on behalf of the improvement district cannot and does not constitute the acts of the improvement district as the acts of the city. As the Court of Appeals stated in the case of Moore v. City of Nampa, supra, the city officers in "making the improvements, were not performing a corporate function of the defendant" (city), nor did they have any "authority to bind it (the city) by any act or failure to act in the premises." For all legal considerations the City and the improvement district were entirely separate and distinct entities. The City of Wendell has not undertaken the street job, the city has not utilized the government-sponsored plans in any manner, and the city has received no benefit from such plans. The government made this advancement to the City of Wendell to assist it in undertaking a street improvement project, the city has not undertaken this project, because such acts as the city officials undertook in this respect were not on behalf of the city but on behalf of the improvement district as special agents and instrumentalities to accomplish a public end. In equity and good conscience the city has not undertaken this job and should not be required to repay the advancement made by the United States.

Upon conflicting, substantial evidence the District Court of the United States found and con-

cluded that the City of Wendell did not undertake this project and did not utilize or get any benefit from the plans and was not obligated to repay the advancement made by the United States.

Under these circumstances it is respectfully submitted that the decision of the Court of Appeals should be reversed and the judgment of the District Court approved and reinstated.

Respectfully submitted,

BRANCH BIRD
CECIL D. HOBDEY

Attorneys for petitioner
Address: Gooding, Idaho

APPENDIX

UNITED STATES OF AMERICA,
Appellant,

vs.

CITY OF WENDELL, IDAHO,
formerly Village of Wendell,
Appellee.

No. 14,819
Sep. 21, 1956

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeal from the United States District Court for the District of Idaho, Southern Division

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Before: POPE and CHAMBERS, Circuit Judges, BOLDT, District Judge.

CHAMBERS, Circuit Judge:

In the spring of the year 1946, the Federal Works Administration supplied the City of Wendell, Idaho,[1] with $1,700 for advance planning for the "grading, draining, and paving of various streets" at Wendell. The city's obligation under the agreement, and under federal regulations which it accepted, was to "complete such plan preparation" and "repay such advance" when "the construction of the public work for which the advance is made is undertaken or started." Then, "undertaken or started" was defined as the time when "the first construction contract is awarded * * *."

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[1]At the time of the acceptance of the loan, Wendell was the "Village of Wendell." It was then governed by a board of trustees presided over by a chairman. Later Wendell became the "City of Wendell" with a mayor and council.

This was all part of the plan[2] enacted by the Congress at the close of World War II to encourage local government units to get public works under way to provide against general unemployment which it was anticipated would arise with demobilization of the armed forces and the return to civilian life of military personnel.

Promptly, plans and specification for paving 71 blocks of the Wendell streets were drawn by a contract engineer hired by Wendell. It was originally contemplated by the city that the streets would be paved with funds to be obtained by issuance of general obligation city bonds. The estimates of cost were thought by the city council to be too great for the city to undertake. Further, the cost would exceed the city's statutory legal limit on general bonds. So, in 1947 and for about a year the plans were put on the shelf.

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[2]The advances were made pursuant to Sec. 501 (a) of the War Mobilization Act, 58 Stat. 791, which was adopted as follows:

SEC. 501. (a) In order to encourage States and other non-Federal public agencies to make advance provision for the construction of public works (not including housing), the Federal Works Administrator is hereby authorized to make, from funds appropriated for that purpose, loans or advances to the States and their agencies and political subdivisions (hereinafter referred to as "public agencies") to aid in financing the cost of architectural, engineering, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the construction of such public works: **Provided,** That the making of loans or advances hereunder shall not in any way commit the Congress to appropriate funds to undertake any projects so planned.

(b) * * * * **Provided further,** That no loans or advances shall be made with respect to any individual project unless it conforms to an over-all State, local, or regional plan approved by competent State, local, or regional authority.

(c) Advances under this section to any public agency shall be repaid by such agency if and when the construction of the public works so planned is undertaken. Any sums so repaid shall be covered into the Treasury as miscellaneous receipt.

(d) The Federal Works Administrator is authorized to prescribe rules and regulations to carry out the purposes of this section.

* * * *"

In 1948-1949 the city appears to have sponsored another paving project of 41 blocks. Seven of the blocks were not in the original 71 blocks projected, but 34 blocks were. The paving may not have been laid on the original plan, but it is fair to say that most of the project could or may have been built according to the plans for which the federal government advanced the money to the city.

Wendell did not believe it was obligated to repay the United States when it paved the streets that it finally did pave. It refused demand for repayment. This suit for $1,700 was then brought by the United States.

Wendell defended on the ground that the original project was abandoned; that the actual project which was completed was not the contemplated project. It relied heavily on variance in area and size of project. It had affirmative defenses: 1. The first project would have exceeded the statutory bonding limit of the city. 2. The contingent liability was not in the annual appropriation of the city. 3. The original project was not authorized by a vote of two-thirds of the city's electors. 4. No ordinance for the work originally projected had ever been published.[3] Wendell also relied on the fact that the construction as actually done was under an improvement district and not by general obligation bonds of the city. The United States countered that the city was bound anyway by the contemporaneous written representations by the city officers that they had authority to execute the agreement and the city had authority to obligate itself in accordance with the agreement. In findings of fact and conclusions

[3]These four defenses were projected upon Idaho statutory law for municipalities.

of law, the trial court agreed with the defendant city in all particulars. Judgment was entered in its favor. The United States appeals.

This court is disposed to be guided by the decision in U.S. v. Board of Education, City of Bismarck, (ND.) 126 F. Supp. 338. That case started with the government planning loan. The initial plans for a school house produced cost estimates that were too expensive for available money. The subsequent plans appear to have used little of the original plans. The overlapping was slight, but apparently the site of the building was the same. Recovery for the advances for the planning was allowed.

While receipt into evidence here of the first plans drawn by the engineer would be quite proper, the question of the occurrence of the conditions requiring repayment should be primarily tested by the description of the proposed project in the application and agreement without particular emphasis on the original plans and specifications bought with the money furnished under the agreement. Here there developed within a reasonable time another project which did not parallel in identity but did overlap as to area. The completed paving is not unlike that described in the application. That is enough. The word planning itself imports fluidity.

This is not to say that if the application had asked for money for plans on the west side of town and a project had been commenced on the east side of town that the money would have become repayable. Or, if there had been a de minimis overlapping of area, then the conditions for repayment probably would not have been attained.

The switch from general obligation bonds to a city improvement district entirely managed and directed by the city, certainly is only a detail in the

method of financing. There is no indication that a city improvement district in Idaho is an autonomous separate municipal arm of government. It is still part of the city. The city sets it up, lets its contracts and collects the assessments.[4] If the district were completely a separate entity, then the government would have no case because the advancement was made to the City of Wendell for the city to do a job. The city did do a job, albeit not co-extensive.

As to the special defenses which Wendell says were in Idaho Municipal law, this court is not disposed to explore them. Likewise, it will not plumb the government's contentions of "mistake" based on the city's written representations that it could enter in the basic contract here involved. Further, it will not examine the contention that the defenses of Wendell do not apply against the United States. After studying H. J. McNell, Inc. v. Canyon County, 76 Idaho 74, 277 P.2d 554, this court is convinced that under the circumstances of this case the Idaho state courts would let a private party recover from Wendell the reasonable value on an implied contract. Obviously, the value here of $1,700 is $1,700. The measure is not the ultimate value to Wendell of that for which it spent the money. That ends our inquiry. See Gamewell Company v. City of Phoenix, 9 Cir., 216 F.2d 928, 219 F.2d 180.

Judgment reversed.

(Endorsed:) Opinion. Filed Sep. 21, 1946.
Paul P. O'Brien, Clerk

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[4]The contract with the contractor for the paving which was signed on May 25, 1949. It was in the name of the City of Wendell. Only once in the agreement is the improvement district mentioned and then only in the most off-handed way.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CITY OF WENDELL, IDAHO,
formerly Village of Wendell, Idaho,
Defendant.

No. 3024
ORDER

The above-entitled matter was tried before this Court, sitting without a jury, on January 13, 1955, and a judgment was entered in favor of the defendant city on February 28, 1955. The United States perfected an appeal, and the United States Court of Appeals for the Ninth Circuit reversed. This matter is presently before the Court on the plaintiff's motion for judgment in accordance with the evidence previously submitted to the Court and the mandate of the Court of Appeals issued herein on November 19, 1956.

The mandate ordered this Court to proceed in conformity with the opinion and judgment of the Court of Appeals. The general rule is that where the merits of a case have once been decided upon an appeal the lower court is without jurisdiction, in the absence of authority from the reviewing court, to do other than proceed in accordance with the direction contained in the mandate. Gibbons v. Brandt, 7 Cir., 181 F. 2d 650, 651. In its opinion the Court of Appeals stated as follows:

"* * * After studying H. J. McNell, Inc. v. Canyon County, 76 Idaho 74, 277 P. 2d 554, this court is convinced that under the circumstances of this case the Idaho state courts would let a private party recover from Wendell the reasonable value of an implied contract. Obviously, the value here of $1,700 is $1,700. The measure is not the ultimate value to Wendell of that for which it spent the money. That ends our inquiry. See Gamewell Company v. City of Phoenix, 9 Cir., 216 F. 2d 928, 219 F. 2d 180."

The Court of Appeals did not, however, mention whether the plaintiff was entitled to interest on the sum of $1,700 prior to judgment. Section 27-1904, Idaho Code, provides that:

"When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of six cents on the hundred by the year on:

1. Money due by express contract.
2. Money after the same becomes due.
3. Money lent.

"The question whether a municipal corporation is within the terms of a general interest statute or other statute, general in terms, applicable to the relationship of debtor and creditor or prescribing the rate of interest under particular circumstances or on specified obligations, is one of considerable difficulty, concerning which there is a decided conflict of authority." Annotation, 24 A.L.R. 2d 928, 934. One group of authorities

adhers to the proposition that a municipal corporation, in the absence of a specific contractual or statutory provision, cannot be held liable for interest upon claims of a general nature, and cannot, because of its status as a unit of government, be deemed to be in the same position in this regard as other debtors. *Ibid.*, page 936; Department of W. & P. v. Okonite-Callender Cable Co., 9 Cir., 181 F. 2d 375. But "there is a group of authorities, numerically larger than that opposed in view, which regards a municipal corporation as in the status of a private debtor, for purposes of applying the prevailing law governing interest on general obligations." *Ibid.*, page 938. This question has never been decided by the Supreme Court of Idaho.

It was assumed by the Court of Appeals, with which assumption this Court does not agree, that the Idaho courts would hold the defendant liable for the $1,700. Having evinced its clairvoyance in this manner, it seems reasonable to believe that the Court of Appeals would similarly assume that the Idaho courts, if presented with the question of whether the defendant, a municipal corporation, comes within the terms of § 27-1904, Idaho Code, would follow the numerical weight of authority and determine that under the facts of this case the defendant city is in the status of a private debtor and liable for interest.

In accordance with the decision of the United States Court of Appeals the plaintiff is entitled to a judgment against the defendant in the sum of $1,700, together with interest thereon at the rate of six per centum per annum from December 17, 1951, the date on which a written demand for payment was made upon defendant, to the date judgment is entered herein.

It is therefore ordered that the motion of plaintiff for judgment be, and the same is hereby granted.

Dated this 21st day of December, 1956.

FRED M. TAYLOR
United States District Judge

Note on behalf of City of Wendell:—

The controversial question determined by this Order is whether or not interest should be allowed before entry of judgment. The City contended that interest should not be allowed prior to entry of judgment because of the following provision of Sec. 3 (e) of the regulations: "(e) No interest charge shall be made for any advance.", and similar provision in Sec. 12 of the regulations. See pg. 9 of this petition; also, because of the ruling of the Court of Appeals for the Ninth Circuit in the case of Dept. of Water & Power v. Okonite-C. Cable Co., 181 F.2d 375, 381, 24 A.L.R. 2d 917, note on page 936; and two state decisions, Dunlap v.

Stannard, 91 Pac. 845, Gregory v. Fidelity & Casualty Co., 110 P. 2d 847.

50-2935. Liability of municipality. — The holder of any bond issued under the authority of this chapter shall have no claim therefor against the municipality by which the same is issued, except to the extent of the funds created and received by assessments against the property within any local improvement district as herein provided for and to the extent of the local improvement guarantee fund which may be established by any such city under the provisions of this chapter; but the municipality shall be held responsible for the lawful levy of all special taxes or assessments herein provided for and for the faithful accounting, settlements and payments of the special taxes and assessments levied for the payment of the bonds as herein provided for. The owners and builders of such bonds shall be entitled to a complete enforcement of all assessments made for the payment of such bonds. A copy of this section shall be plainly written, printed, or engraved on the face of each bond so issued.

50-3128. Municipality not liable.—The holder of any bond issued under the authority of this chapter shall have no claim therefor against the municipality by which the same is issued, in any event, except for the collection of the special assessment made for the improvement for which said bond was issued, but his remedy, in case of nonpayment, shall be confined to the enforcement of such assessments. A copy of this section shall be plainly written, printed or engraved on the face of each bond so issued.

Art. 8, Sec. 3, Idaho Constitution:

Limitations on county and municipality indebtedness — No county, city, town, township,

board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the State.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Statutes:

Act of October 13, 1949, 63 Stat. 841	8
Idaho Code: Sec. 50–2935	5
War Mobilization and Reconversion Act of 1944, 58 Stat. 791, 50 U. S. C. App. 1671, 1946 ed.:	
Title V	2, 4, 8
Sec. 501	4
Sec. 501 (a)	2
Sec. 501 (b)	3
Sec. 501 (c)	3
Sec. 501 (d)	3
Sec. 501 (e)	4

Miscellaneous:

44 C. F. R. 1946 Supp.:	
201.10	9
201.12	5
S. 2116, 95 Cong. Rec. 11056, 11057, 13205, 13208	8
Sen. Rep. 751 81st Cong., 1st sess	9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 700

CITY OF WENDELL, IDAHO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court for the District of Idaho (R. 25–26)[1] is not reported. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 34–38) is reported at 237 F. 2d 51.

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1956 (Pet. App. 34). A petition for rehearing, timely filed, was denied on November 12, 1956. The petition for a writ of certiorari was filed on January 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] References are to the printed record before the Court of Appeals.

QUESTIONS PRESENTED

1. Whether an Idaho municipality was liable to repay a public works planning advance made pursuant to Title V of the War Mobilization and Reconversion Act of 1944, where the public works contemplated by the advance agreement were carried out by the municipality, but were financed through an improvement district.

2. Whether the court below misinterpreted Idaho law in allowing recovery on an agreement between the United States and an Idaho municipality advancing funds for public works planning, where the cost of the public works planned with the advance, but not the amount of the advance itself, would have exceeded the municipality's debt limitation if (as was not the case) the works had been financed through direct municipal indebtedness.

STATUTE INVOLVED

Title V of the War Mobilization and Reconversion Act of 1944 (58 Stat. 791, 50 U. S. C. App. 1671, 1946 ed.) prior to its expiration in 1947 provided:

Title V—Public Works

> SEC. 501. (a) In order to encourage States and other non-Federal public agencies to make advance provision for the construction of public works (not including housing), the Federal Works Administrator is hereby authorized to make, from funds appropriated for that purpose, loans or advances to the States and their agencies and political subdivisions (herein-

after referred to as "public agencies") to aid in financing the cost of architectural, engineering, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the construction of such public works: *Provided,* That the making of loans or advances hereunder shall not in any way commit the Congress to appropriate funds to undertake any projects so planned.

(b) Funds appropriated for the making of loans or advances hereunder shall be allotted by the Federal Works Administrator among the several States in the following proportion: 90 per centum in the proportion which the population of each State bears to the total population of all the States, as shown by the latest available Federal census, and 10 per centum according to his discretion: *Provided,* That the allotments to any State shall aggregate not less than one-half of 1 per centum of the total funds available for allotment hereunder: *Provided further,* That no loans or advances shall be made with respect to any individual project unless it conforms to an over-all State, local, or regional plan approved by competent State, local, or regional authority.

(c) Advances under this section to any public agency shall be repaid by such agency if and when the construction of the public works so planned is undertaken. Any sums so repaid shall be covered into the Treasury as miscellaneous receipts.

(d) The Federal Works Administrator is authorized to prescribe rules and regulations to carry out the purposes of this section.

(e) As used in this section, the term "State" shall include the District of Columbia, Alaska, Hawaii, and Puerto Rico.

STATEMENT

This is an action brought by the United States to recover an advance of $1,700 made by the Government to the petitioner, City of Wendell, Idaho, for public works planning pursuant to Title V of the War Mobilization and Reconversion Act of 1944, *supra*, pp. 2–4.

The City of Wendell in December 1945 applied to the Federal Works Administration for a public works planning advance pursuant to Section 501 of the War Mobilization and Reconversion Act of 1944, which authorized "loans or advances to the States and their agencies * * * to aid in financing the cost of architectural, engineering, and economic investigations, and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the construction" of public works (R. 28, 29). The City's application stated that the advance was to be used to prepare plans and specifications for a street paving project, described as "[i]mprovement of approximately 5½ miles of streets" (R. 21). Attached to this application was a copy of a resolution of the City's Board of Trustees authorizing the Board's chairman to apply for an advance (R. 24). In April 1946, the Government agreed with the appellee to advance $1,700 for plan preparation of a public work described as "grading, draining, and paving of various streets" located at Wendell, Idaho

(R. 29, 57), in exchange for the City's agreement that it would "complete such plan preparation" and "repay such advance when required in accordance with the regulations of the [Federal Works Agency]" (R. 29, 57). The agreement also contained a certification by the City's clerk that the chairman of the City's Board of Trustees was authorized to execute the instrument (R. 58).

The regulations of the Federal Works Agency which were made a part of the agreement provided that the advance was to be repaid "when the construction of the public work for which the advance is made is undertaken or started. The construction shall be considered as undertaken or started when the first construction contract is awarded or the applicant begins construction with its own forces." (R. 29; 44 C. F. R. 1946 Supp. 201.12.)

Pursuant to the terms of the agreement and the regulations, one-half of the advance was paid to the City. Detailed specifications and plans for the paving project, described in the application and agreement, were then prepared by private engineers under contract with the City. (R. 29, 30.) When these plans were completed, the balance of the advance was paid to the City (R. 30). In 1949, through an improvement district created under Section 50–2935 of the Idaho Code, the City began to pave certain streets covered in the original plans. This work, when completed, encompassed approximately one-half of the street area included in the original plan. (R. 30, 40, 41.) The macadam (hot oil and gravel) type of paving provided for in the specifications prepared with

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the advance was used in the work completed by the City (R. 41, 47, 52, 56). However, seven blocks were paved which were not included in the original plans (R. 46).

The Mayor of Wendell testified that the City, on receiving the original plans and specifications in 1947, and obtaining an estimate of the cost of the work, decided that the scope of the planned project was beyond its resources and that the cost would exceed the City's statutory bonding limit (R. 47, 48). About one year later, according to the Mayor, a more modest paving project was undertaken, financed through a local improvement district to avoid exceeding the bonding limit (R. 48, 50, 51). Although the Mayor testified that the original plans and specifications were not used in any way in planning the work actually undertaken, the Government's witness testified without contradiction that the general character of the completed work, the materials used, and the method of grading and application conformed substantially with the plans and specifications prepared with the advance (R. 41, 47, 52, 56). The City retained possession of the original plans and specifications during the 1948–49 period when the improvement district was established and the new paving construction planned (R. 49, 50). The plans were not returned to the engineers who had prepared them until April 1949, only one month prior to the City's contracting for the paving work (R. 30, 49). No other plans and specifications were apparently prepared or used by the City or the new contractor during the construction phase of the work (R. 54, 67).

After the City had begun part of the paving work contemplated by the original agreement, the Government sought repayment of the advance, relying on the regulatory provision that an advance becomes repayable "when the first construction contract is awarded." Suit was brought after the City had repeatedly refused to repay the amount advanced under the agreement. (R. 5.)

The City, in its answer (R. 10), denied that it was obligated by the statute and regulations to repay the Government, and raised four affirmative defenses based on the alleged invalidity of the advance agreement under Idaho law. After hearing, the District Court gave judgment for defendant, finding that the advance was not repayable, because the public work planned had never been undertaken (R. 31, 34). The Government moved to amend the court's findings and conclusions to recover the advance on the theory that it had been mistakenly paid because of misrepresentations on the part of the City as to its contracting powers (R. 28). The court amended its order to hold alternatively that the planning agreement was void under state law, but refused to hold that the Government was entitled to recover its mistaken payments (R. 34, 35).

On appeal, the Court of Appeals for the Ninth Circuit unanimously reversed, holding that the advance became repayable when the street paving project contemplated by the advance agreement with the Government was undertaken by the City (Pet. App. 37, 38). The court did not pass directly upon petitioner's special defenses based on Idaho law since it concluded

that Idaho law would permit even a private party to recover the advances on a theory of implied contract.

ARGUMENT

Petitioner apparently does not directly challenge the construction given the now expired Title V of the 1944 War Mobilization and Reconversion Act[2] by the court below. Its contentions rather are that no recovery could be had under the Act on the facts of this case, and that the Ninth Circuit has erroneously interpreted Idaho law in allowing recovery. The Ninth Circuit's decision is clearly correct on each of the questions raised by the petition which have no general importance beyond the bounds of this case. Hence, there is no warrant for review by this Court.

1. Petitioner contends (Pet. 12–19) that it was not liable for the advance under the Mobilization Act because the paving work was financed through an improvement district to avoid exceeding the City's bonding limit. The short answer to this contention is that repayment is required by the Act not merely when the applicant performs the public works itself but also, as the court below recognized (Pet. App. 37), whenever the work contemplated by the advance agreement is undertaken, irrespective of the formal entity carrying out the work. The need for such flexibility

[2] The substance of Title V, which expired in 1947, was reenacted as part of the Act of October 13, 1949 (63 Stat. 841). The repayment provision was revised to make it clear that the Government was entitled to repayment when "the construction of the public works is undertaken or started." The legislative history of the later Act leaves no doubt that this revision was intended as a clarification. See Senate debate on S. 2116, 95 Cong. Rec. 11056, 11057, 13205, 13208.

in the Act is evident, since otherwise applicants for planning advances could easily avoid contractual repayment obligations by carrying out the work through a separate legal entity. Moreover, as the court below makes plain (Pet. App. 37, 38), petitioner was the real executant in this case, since it made the paving contract, supervised the work, and collected the assessments, the improvement district being merely a device for avoiding state financing limitations.

2. Petitioner argues (Pet. 21–24) that the advance agreement was void under Idaho law because the paving project contemplated by the agreement would have exceeded the City's bonding limitation if financed by direct municipal indebtedness. The court below did not pass upon this and other claims by petitioner that the agreement was invalid, since it found that a private person would have been able to collect from the municipality under state law even assuming that the agreement was formally invalid (Pet. App. 38). The defect in petitioner's argument is obvious in any case, since the obligation under the advance agreement (amounting to $1700) would not have exceeded the City's debt limit, and that agreement, which was entirely independent of any subsequent contract with a third party to perform the public works, was clearly within the City's powers.[3]

Petitioner also argues (Pet. 26–29) that the court below erred in holding that the Government could

[3] Petitioner was not obliged to perform the contemplated public works because it entered the advance agreement, but only to repay the advance if those works were undertaken. Under the Act, the Government exercised no control over the public work itself. See 44 CFR 1946 Supp. 201.10; Sen. Rep. 751, 81st Cong. 1st Sess.

collect from the City, assuming the invalidity of the agreement. The Court of Appeals, to which this Court customarily defers in the interpretation of local law, held that under Idaho law recovery could be had against the City for the reasonable value of the contract, in this case the amount of the advance (Pet. App. 36, 38). Petitioner's attack on this holding is without merit. For, in seeking to distinguish the Idaho decisions followed by the Court of Appeals (Pet. App. 38), petitioner (Pet. 26–28) relies chiefly on the alleged invalidity of a contract for construction of the proposed project if financed by the City itself (instead of through the device of a specially created improvement district). This argument ignores the fact that, as we have already noted, the advance agreement on which alone the Government's claim was based was entirely valid, as was the method of financing the construction ultimately chosen by the City.[4]

[4] Accepting the construction given Title V by the court below, petitioner also argues (Pet. 29–31) it was still not liable to repay the advance, since the District Court found it did not "use" the plans in performing the work. The Court of Appeals holding, however, was based on its finding that the project contemplated by the advance agreement was undertaken, a conclusion which was fully supported by the record and was not contradicted by anything in the District Court's findings (R. 28–35).

CONCLUSION

For the above reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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